

071728809 [2007] RRTA 324 (19 December 2007)

DECISION RECORD

RRT CASE NUMBER: 071728809

DIAC REFERENCE(S): CLF2007/110102

COUNTRY OF REFERENCE: Nepal

TRIBUNAL MEMBER: Susan Pinto

DATE DECISION SIGNED: 19 December 2007

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).

The applicant, who claims to be a citizen of Nepal, arrived in Australia and applied to the Department of Immigration and Citizenship for a Protection (Class XA) visa. The delegate decided to refuse to grant the visa and notified the applicant of the decision and his review rights.

The delegate refused the visa application on the basis that the applicant is not a person to whom Australia has protection obligations under the Refugees Convention.

The applicant applied to the Tribunal for review of the delegate's decision.

The Tribunal finds that the delegate's decision is an RRT-reviewable decision under s.411(1)(c) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.412 of the Act.

RELEVANT LAW

Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. In general, the relevant criteria for the grant of a protection visa are those in force when the visa application was lodged although some statutory qualifications enacted since then may also be relevant.

Section 36(2)(a) of the Act provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (together, the Refugees Convention, or the Convention).

Section 36 also relevantly provides:

Protection obligations

- (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
- (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
- (5) Also, if the non-citizen has a well-founded fear that:
 - (a) a country will return the non-citizen to another country; and

- (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
subsection (3) does not apply in relation to the first-mentioned country.

Further criteria for the grant of a Protection (Class XA) visa are set out in Parts 785 and 866 of Schedule 2 to the Migration Regulations 1994.

Definition of ‘refugee’

Australia is a party to the Refugees Convention and, generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1 and *Applicant S v MIMA* (2004) 217 CLR 387.

Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.

There are four key elements to the Convention definition. First, an applicant must be outside his or her country.

Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve “serious harm” to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression “serious harm” includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant’s capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.

Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors. However the motivation need not be one of enmity, malignity or other antipathy towards the victim on the part of the persecutor.

Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a

particular social group or political opinion. The phrase “for reasons of” serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.

Fourth, an applicant’s fear of persecution for a Convention reason must be a “well-founded” fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a “well-founded fear” of persecution under the Convention if they have genuine fear founded upon a “real chance” of persecution for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A “real chance” is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.

In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence.

Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

CLAIMS AND EVIDENCE

The Tribunal has before it the Department’s file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.

Application to the Department

The applicant indicated on the application form that he is from Nepal. The applicant indicated that he is a Hindu and is married with children. The applicant has had several years of education and was in the Indian army for many years.

In relation to his claims to be a refugee, the applicant provided a typewritten statement. The applicant’s claims are summarised below.

- The applicant joined the Indian army and served the army for many years, before retiring;
- The Maoists began a revolution in 1995. Instead of persuading people to join their party, they used violence against people and began torturing, kidnapping and murdering people who refused to support them financially;
- Many innocent civilians, political opponents and others were kidnapped and killed and local police stations, army barracks, government offices and other development infrastructures were attacked and destroyed;

- People most affected by the Maoists were political opponents, policemen and army personnel who were stationed at remote areas where the government did not have a stronghold;
- The applicant was targeted by the Maoists activists as a result of his profession as an Indian army officer and because of his political beliefs;
- As an army officer, the applicant was devoted to protecting civilian life and was strongly opposed to the activities of the Maoists whose actions were akin to terrorism, rather than political revolution;
- The Maoists opposed anyone supporting the Congress party and His Majesty's government and for that reason hated army and police personnel who supported the government. The applicant was a strong believer of His Majesty's government and was a target for the Maoists;
- The applicant's problems began in the end 1990s when he was on leave from the army and during a time when the Maoists activities were growing rapidly;
- The applicant was at home with his family when a Maoist Commander from the next village, arrived with other men who were carrying light machine guns. The men charged into the applicant's home and said that they wanted to talk to the applicant. They made the applicant's wife cook for them;
- The Maoist officer introduced himself as the Maoist Area Commander and asked the applicant to resign from the Indian Army services and to join the Maoists to strengthen their movement;
- The applicant was offered a position and asked to train their rebels and help the Maoists financially;
- The applicant was told to go with the rebels. He did not wish to join them and become a terrorist, but told them that he would resign and join the Maoist group. The Maoist Commander agreed to allow the applicant time to do so, but asked for a large donation in the meantime. The applicant did not have this money, but as the armed men were holding his family at gunpoint, he agreed to give them a smaller amount in order to save his family's life;
- The Maoists subsequently left with the money but told the applicant that he must join them as soon as possible to save his life and property. The applicant quickly locked the door and his family were shocked and distressed;
- The following morning, the applicant went to the local police station to report the incident. However, when he arrived there he found that the police station had moved;
- The applicant left his home without completing his holidays and went to stay with relatives in City A before he returned to duty in India;
- The applicant later returned to Nepal to assist his family who had been harassed by the Maoists. The applicant's property had been destroyed and

belongings stolen. The applicant's wife was also under continuous threat and harassment and the Maoists continually told her to call the applicant back to Nepal;

- After the applicant's arrival back to Nepal, Maoist rebels came to the applicant's home. A new Maoist area commander introduced himself to the applicant and ordered him to come with them. Some of the applicant's family were kicked when they tried to assist the applicant. The men were dressed in combat clothing and were armed with pistols and Khukuri;
- The applicant was taken to a park which was a short distance from his house. As soon as the applicant arrived there the Maoist commander told the applicant that he was very disappointed with the applicant's actions as he had not resigned from the army and joined them;
- The applicant was hit and he tried to resist, but was violently attacked by all the men. The last thing that the applicant remembers is being hit by the butt of a gun. When he regained consciousness he was in a hospital. The applicant had been found by some neighbours and taken to a hospital;
- The applicant was bruised and he had marks all over his body. After staying in the hospital for several days he was discharged;
- The applicant went to a relatives' home in City A with his family and subsequently returned to the army;
- The Maoists destroyed everything inside the applicant's family home and locked the whole house;
- When the applicant returned to the army, the Maoists continued threatening his family in City A. By this time, the Maoists had taken control of almost all of the remote areas of the country and were gradually penetrating the bigger cities and towns;
- In the mid 2000's, the applicant visited his family in City A. His wife told the applicant that the Maoists were still looking for him and he returned to his army barracks;
- The applicant retired from the army later on and returned to live with his family in Nepal. The applicant had been living with his family for a short while and was in constant fear of interrogation and retaliation by the Maoists;
- After some months, the applicant returned to his home village with a relative and met the Maoist area commander who agreed to unlock the applicant's house. The Maoist area commander told the applicant that he had to suffer because he did not support the Maoists and had not helped them. The applicant was ordered to give a donation, but the commander also ordered that the house be unlocked;
- The applicant returned to his family home to find that the house had been almost destroyed and everything was broken into pieces. The Maoists had set

fire to their clothes, paper, kitchen wares and glass wares which were all smashed and destroyed;

- Shortly after the applicant had been home, Maoists came to his home and locked the door from inside. The applicant was threatened and asked for more money than he could afford. The applicant was told that he and his family would be harmed if he did not give them money;
- The applicant gave them money and they left. The applicant was also told that if he did not obey their orders the police would kill his family member. The applicant's friend, who also served in the army was in the same situation and was also a victim of Maoist torture and extortion. He had no choice but to flee to another country;
- The Maoists continued to come around asking for donations until he was left with no money. The applicant was told to pay a large amount of money and given a couple of days to do so. The applicant did not have the money to do so and subsequently left his home village and went to Kathmandu where he stayed with relatives;
- After considering his situation, the applicant realised that he was no longer safe in Nepal and that as long as he lived in Nepal he would be vulnerable to torture and would be unable to live a normal life; and
- In light of the fact that the applicant is an ex-army personnel he believes that he will be tortured and harassed by the army and is a member of one of the groups that they target. For that reason, the applicant requests that the Australian government grant him protection.

Application to the Tribunal

The applicant provided a further statement to the Tribunal in which he repeated the claims made to the Department.

The applicant also provided a medical certificate to the Tribunal indicating that he had been hospitalised as a result of a “[information about the injuries]”.

Prior to the Tribunal hearing, the applicant provided originals of the above documentation and also provided the following additional documentation (originals):

- Certificate stating that the applicant was appointed in the Regular Army;
- Certificate from a high ranking officer, extending his congratulations to the applicant on the grant of his honorary rank on leaving the army;
- The applicant's passport, indicating that the applicant's profession is “ex-army”; and
- Letter from a family member, stating that the applicant has been a target for Maoists for several years and had his house destroyed and locked up. This family member also states that the applicant was in a “helpless situation” and he went with the applicant to ask that the applicant's home be unlocked. The

family member further states that the Maoists repeatedly asked the applicant for money and want him to join their group.

The applicant appeared before the Tribunal to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali (Nepalese) and English languages.

The applicant stated that he wrote his statement in Nepalese and his friend translated it for him. The applicant's friend read the statement back to him after he had completed the translation.

The applicant confirmed that he is a citizen of Nepal. Although the applicant resided in India for several years and served in the Indian army, he did not acquire citizenship of any other country. The applicant was able to serve in the Indian army, even though he is a citizen of Nepal, as a result of a treaty between the Indians and Nepalese signed in 1950. In response to queries from the Tribunal, the applicant confirmed that he was referring to the Treaty of Peace and Friendship between India and Nepal.

The applicant's family remain in Nepal. The applicant's family currently lives in their home village and a family member lives close by, but separately from his family. The applicant's other family members live overseas.

The applicant joined the Indian army in the 1970s and remained until retirement. [Information about applicant's work history deleted in accordance with s.431 as it may identify the applicant].

Whilst the applicant was in the Indian army he was stationed to various places. The applicant moved from different commands depending upon the army's strategy.

When asked why he chose to retire, the applicant stated that he had served the army for many years. The applicant confirmed that he obtains a pension entitlement and also obtains other entitlements. Whilst the applicant was in the army he returned to Nepal once or twice every year to visit his family. The applicant would generally return for a few weeks at a time, but it would depend upon his situation each year. The applicant did not usually take more than 1 months' leave each year because it would affect his pension if he did so.

The Indian army does not place any limitations on the applicant gaining employment elsewhere. However, the applicant has not done any other work since his retirement. When the applicant retired, he returned to City A where his family had been living in rented accommodation. The applicant and a family member decided that they would ask the local Maoist area commander if the applicant and his family could return to their family home. The house had been locked for a long period of time and when it was opened it was in extremely bad condition. The applicant and his wife spent considerable money and time repairing the house and cleaning it before they were able to move back into the house.

The applicant lived with his family at the house in their home village for a short time before moving to Kathmandu for safety. The applicant had been back at his house for a short while when the Maoists came to his home. The Maoists demanded that the applicant pay money and told him that if he did not pay the money they would harm his family. The applicant gave them some money and they left, but told the applicant that they would return and he would be required to pay much more. The applicant had no way of paying a large amount of money

and went to Kathmandu to hide from the Maoists. The applicant stayed in Kathmandu for a period of time and lived with relatives. The applicant's family remained in their home village and the Maoists would return regularly to ask them for money and ask about the applicant's whereabouts. The Maoists would also take items from the applicant's family and would threaten to harm them if they reported them to the police.

When asked whether anything happened to him whilst he was in Kathmandu, the applicant stated that it did not.

The Tribunal asked the applicant about other incidents of harm from the Maoists. The applicant stated that once he went on leave and was at his family home when Maoists came in uniform and told the applicant that because he is in the military he should leave and join their people and help train Maoists. The Maoists came inside the applicant's family home and demanded that the applicant's wife cook for them. The Maoist area commander told the applicant that he should join their party. The applicant told them that he could not do that because he was not retired. The applicant was repeatedly told that he should join the Maoists. The applicant eventually said that he could not go with them at that time, but told them that he would return to the army and resign. The applicant was asked for more money. He told the Maoists that he did not have that amount of money. The Maoist commander pointed his rifle at the applicant and the applicant gave him what he has which was his entire savings. The applicant's family were frightened and crying during the incident.

The following day, the applicant went to the police station but discovered that it had moved. The applicant felt that he had no choice but to leave his home village and go to City A. After staying in City A for a short period, the applicant returned to work in India.

The applicant later returned to Nepal. Whilst the applicant was away at work, the Maoists had put pressure on his family and had visited the family home and taken more items and harassed the family. The applicant had been back in the village for a few days when Maoists came to his home and knocked on the door. Several Maoists came inside the applicant's family home and tried to take him away. The applicant's family grabbed the applicant and tried to prevent him from being taken away. The applicant's family were kicked and the applicant was taken outside and taken to a park. After walking for awhile, the applicant was told that he should have returned earlier and was punched by one of the Maoists. The other Maoists then all started punching the applicant. The applicant lost consciousness and fell to the ground. The applicant was subsequently found by villagers who had been notified by the applicant's family that the applicant had been taken away by the Maoists.

The applicant regained consciousness when he was in hospital. After being discharged from hospital, the applicant was taken to City A. The applicant settled his family into accommodation in City A and returned to India.

The applicant also returned to Nepal once but only stayed for a short while with his family, when the Maoists again began asking questions about the applicant. When the applicant was about to retire he and a family member decided that it was the right time to ask the Maoists for leniency and to open the house. The applicant believed that because the Maoists were about to form a government that they wanted to show leniency. The Maoists also agreed to open the applicant's family home on the condition that the applicant pay them money. When the house was opened everything that could be used by the Maoists had been taken, whereas other items and goods had been destroyed. The applicant confirmed that his family have remained living in the house in their home village, but the Maoists continued to ask about the

applicant's whereabouts. The applicant telephoned his family 2 days before the hearing and had been told that the Maoists had visited several days earlier and asked for money.

When asked why he currently fears returning to Nepal, given that there has been a ceasefire, the applicant stated that although the Maoists no longer carry guns, they continue to have other weapons and in reality very little has changed in Nepal. The applicant stated that he has been brutally beaten and "left for dead" and had to pay donations on several occasions. The applicant stated that he does not have the large amount of money that the Maoists have demanded that he pay. When asked who visits his house to demand money, the applicant stated that a couple of the people are from his village, whereas the other people are from other districts. The applicant has been allowed to open up his home by the Maoist commander, but they have also continued to demand money from him. The applicant also believes that the Maoists will continue to want him to join them because he is a skilled army officer. The applicant is unwilling to join them. Although the Maoists have joined the government ranks, there are still people in the lower ranks who wish to retaliate against the applicant because he has refused to join them. The applicant does not believe that they will leave him alone because he refused to join them and also because he has not paid the large amount of money that they have demanded. The applicant believes that because he was in the military he is viewed as being pro-government and opposed to the Maoists.

The Tribunal advised the applicant that his evidence indicated that he had lived in Kathmandu without any problems occurring. The applicant stated that although he lived in Kathmandu with relatives he did so discretely and without drawing attention to himself. The applicant believes that if he returned to Kathmandu it would not take long before the Maoists discovered that he was living there and would retaliate against him or attempt to get him to join them. The applicant stated that the Maoists are everywhere in Nepal and Kathmandu is a small place where people know each other. The applicant would be unable to live safely in Nepal for any length of time. The applicant believes that his life is in danger in Nepal. The applicant also stated that it is his understanding that the Maoists have lists of people who they wish to target.

The Tribunal discussed the possibility of the applicant obtaining effective protection in India, given that he had lived there safely for many years. The applicant stated that whilst he was in India he had the protection of the army and he would no longer have that if he returned to India. The applicant believes that he would also be at risk from the Maoists in India. The Tribunal advised the applicant that it is difficult to accept that the Maoists in India would know about the applicant's problems in Nepal. The applicant stated that he would be in danger in several places in India as there is an open border between India and Nepal and Nepalese Maoists can come and go into India. The applicant would be forced to be in hiding and live discretely without drawing attention to himself. The applicant believes that if he returned to India he would have to move constantly so as not to draw attention to himself.

The applicant requested further time to provide a written response to the issues of concern raised by the Tribunal. The Tribunal agreed to grant the applicant a further 4 weeks to provide written comments.

The Tribunal received a submission from the applicant in which the applicant states the following:

I thank you to the member who has given me the opportunity to clarify my safety in Kathmandu and India.

Why Kathmandu is not a safe place for me?

You have accepted that I can not live and stay in my birth and home town, [home town], due to the threat posed by Maoist. However you are reluctant to accept that Kathmandu is not a safe place. In this regard as I mentioned in the hearing, when I escaped from [home town] to Kathmandu I was in enormous fear. I am still in fear. Even now I am hearing that the Maoists are in militant and donation collection drive. Please find attached publication which it clearly states that how they are committing crime and atrocities to the civilian and professional.

While I was in Kathmandu I was in hiding in [relative's] house and I was afraid that Maoist might come and take and kill me.

After joining government, the Maoists became more powerful all over the Nepal including Kathmandu The Maoist sister organization, youth Communist League (YCL) are involved in various criminal activities such as killing, torturing, abduction. They target anyone who does not obey their demand. Now they are in the government so there is no security in Nepal. Now Kathmandu is open field for them therefore it is impossible for me to live and stay in Kathmandu because I am already targeted by them.

For the evidence please find attached a few publications.

Why I can not live in India?

After my retirement from Indian Army I went back to Nepal to stay with my family. India is also not safe place for me because there are lots of Maoist influences in India as well. Please find attached documentation with it which clearly states that there is also risk of my life. There are lots of looting, kidnapping, torturing activity going on in India by the Maoist.

It is also hard to live with family in India due to different language and social activities.

The applicant also attached the following articles:

- Kantipur Report, 29 November 2007, 'Maoists continue atrocities'. The report states that people in Nepal have continued to be tormented and lands and property seized in rebel style donations. The report also refers to Maoists continuing to assault persons at random;
- Kantipur Report, 29 November 2007, 'Why PLA combatants flee camps' The report refers to a platoon commander fleeing the PLA camp. The commander had previously been a major in the Nepalese army and had been abducted by the Maoists in 2004 and was being sought by Maoists;
- Amnesty International Report, 2005, which discusses unlawful killings and abductions by Maoists; and
- Reports on difficulties faced by Nepalese in India.

Independent evidence

In addition to the documentation provided by the applicant, the Tribunal has also had regard to the following independent evidence in making its decision.

Political developments in Nepal

King Gyanendra Bir Bikram Shah Dev used constitutional emergency powers to exert direct control over the government until 27 April 2006. The King stated that emergency powers were required to fight the Maoist insurgency. In April 2006, due to a popular uprising, the King restored parliament and ceded power to a government headed by Prime Minister Girija Prasad Koirala and run by the Seven Party Alliance (SPA). On 21 November 2006, the coalition SPA government and the Maoists signed a Comprehensive Peace Agreement (CPA) ending a decade-long insurgency (US Department of State 2007, *Country Reports on Human Rights Practices 2006 – Nepal*, March www.state.gov/g/drl/rls/hrrpt/2006/78873.htm – Accessed 8 March 2007; US Department of State 2007, 'Background Note: Nepal', May <http://www.state.gov/r/pa/ei/bgn/5283.htm> – Accessed 16 July 2007).

Under the terms of the CPA a program for political transformation was agreed. This program includes an interim constitution, an interim legislature and elections of a constituent assembly. An interim constitution was completed by the SPA and the Maoists on 15 December 2006. On 15 January 2007, as outlined in the CPA, the Nepali parliament dissolved itself and established an interim parliament. The current interim government has 329 members including 83 Maoist representatives. On 1 April 2007 the ruling eight party government formed an interim Council of Ministers including five Maoist ministers. The interim parliament will exercise legislative powers until the election of the formal Constituent Assembly (Government of Nepal 2006, *Comprehensive Peace Agreement held between Government of Nepal and Communist Party of Nepal (Maoist)*, ReliefWeb website, 22 November, Article 3.2 <http://reliefweb.int/rw/rwb.nsf/db900sid/vbol-6vshk8?opendocument> – Accessed 16 July 2007; International Crisis Group 2007, *Nepal's Constitutional Process: Asia Report No128*, 26 February, p.7-8 http://www.crisisgroup.org/library/documents/asia/south_asia/128_nepal_s_constitutional_process.pdf – Accessed 30 May 2007; US Department of State 2007, 'Background Note: Nepal', May <http://www.state.gov/r/pa/ei/bgn/5283.htm> – Accessed 16 July 2007).

The constituent assembly will have the function of deciding the future of the monarchy in Nepal (*Interim Constitution of Nepal* 2007, World Statesmen website, Articles 63, 64, 82, 83 & 159 http://www.worldstatesmen.org/nepal_interim_constitution2007.pdf – Accessed 1 June).

The election for the Nepalese constituent assembly has been set by the interim government for 22 November 2007. The interim parliament has adopted a resolution which allows for the removal of the king if the king attempts to sabotage or interfere with the Constituent Assembly. The removal of the king must be supported by a two thirds majority of parliament. Sources state that despite this legislation there are no current plans to depose the king whose future will be decided at the first meeting of the constituent assembly ('Nepal sets key national elections for November 22' 2007, *Reuters Alert*, 24 June – CISNET Nepal; Chandrasekharan, S. 2007 'NEPAL: Interim Parliament Empowers itself to Abolish Monarchy: Update No.128' South Asia Analysis Group, 16 June <http://www.saag.org/notes4/note388.html> – Accessed 16 July 2007).

Security since the ceasefire

The US Department of State has reported that despite the current cease fire agreement, Maoists continue to be implicated in violent activities. The report states that political parties have complained of continued threats and intimidation from Maoists:

After the April 2006 cease-fire announced by the government and the Maoists, incidents of human rights violations by the government declined substantially while incidents of human rights violations by the Maoists remained relatively unabated. Even after signing a comprehensive peace agreement with the government in November 2006, Maoists' extortion, abduction, and intimidation largely remained uncontrolled. Although activities by other political parties have increased significantly in the rural parts of Nepal, political party representatives, police, non-governmental organization (NGO) workers, and journalists reported continuous threats and intimidation by Maoist cadres (US Department of State 2007, *Background Note: Nepal*, US Department of State website, May, <http://www.state.gov/r/pa/ei/bgn/5283.htm> – Accessed 25 May 2007).

The UK Home office has also reported that Maoist rebels were implicated in human rights abuses in 2006:

Despite the signing of the ceasefire agreement and repeated pleas from the United Nations, there were reports in 2006 that the Maoist rebels continued to commit human rights abuses including killings, abductions, torture, and extortion. There were also reports that Maoist forces did not release the thousands of children under the age of eighteen believed to be serving in their ranks. In some instances, the rebels reportedly even continued to forcibly recruit child soldiers (UK Home Office 2007, *Operational Guidance Note: Nepal*, European Country of Origin Information Network website, 23 March, http://www.ecoi.net/file_upload/432_1175069868_nepalogn.pdf - Accessed 4 June 2007).

The youth wing of the Communist Party of Nepal (Maoist), the Youth Communist League, has undertaken ongoing coercive activities against Maoist opponents, including intimidation and physical attacks. Sources claim that the YCL contains ex-Maoist combatants and is being used by the Maoists to maintain an intimidating presence throughout Nepal and outside the scope of United Nations scrutiny. The major political parties have raised concerns regarding the aggressive behaviour of the YCL. Concerns have also been raised regarding the potential use of force and intimidation by the YCL in the forthcoming elections ('Young Communist League, Nepal' (undated), Wikipedia, http://en.wikipedia.org/wiki/young_communist_league,_nepal – Accessed 31 May 2007; Rajat, K.C. 2007, 'Young Communist League Or Young Criminal League', *Scoop Independent News*, 24 May, <http://www.scoop.co.nz/stories/hl0705/s00430.htm> – Accessed 31 May 2007; Chandrasekharan, S. 2007, 'NEPAL: Law & Order should be restored first before CA elections are thought of, Update No.127', South Asia Analysis Group website, 26 May, <http://www.saag.org/%5cnotes4%5cnote385.html> – Accessed 31 May 2007).

Jane's Intelligence Review also reported that violence has increased in Nepal despite a Maoist pledge that "they will not be derailed from their peaceful oath". The report continues,

However, questions remain over whether the Maoists are genuinely committed to joining the political mainstream and renouncing their former sources of power. There have been reports in the Nepalese press that Maoist cadres are continuing to demand 'voluntary donations' in the capital, extorting money from businessmen and kidnapping their children. In addition, Nepalese newspapers have claimed that the YCL has threatened their editors who publish critical articles (Gellner, David 2007, 'Vying for position – Nepal's former rebels struggle to enter the fold', *Janes Intelligence Review*, 23 April).

The report goes on to indicate the following security concerns:

- Under the terms of the peace agreement, the Maoist militia called the People's Liberation Army (PLA) was placed in camps and its weapons locked up under UN supervision. However there is some doubt as to whether all the PLA members are in the camps, and whether all their weapons have been handed in.
- When elections are eventually held, there is the risk that the Maoists may win only a small number of votes "which might tempt them to return to the jungle to push for power militarily".
- If the Maoists win a plurality of votes they may interpret this as "a mandate to seize control of government" in which case "the Nepalese Army, logistically and perhaps materially supported by India, could intervene..."
- The election polls are likely to be delayed. There are still many people displaced from their homes and "intimidation appears to be on the rise in a general atmosphere of lawlessness". October or November seems a realist estimate of when they may be held (Gellner, David 2007, 'Vying for position – Nepal's former rebels struggle to enter the fold', *Janes Intelligence Review*, 23 April).

A March 2007 *Stratfor* report notes the "apparent lack of progress in disarming the Maoist rebels" The UN mission which is overseeing the disarmament process "cites the discrepancy between the 35,000 combatants who have registered themselves and the 3,000 to 4,000 weapons that have been surrendered so far" The report also discusses the possibility that the country may move from being a monarchy to a republic, and the instability that might ensue as the various groups push for power ('Nepal: A prime minister's move against the monarchy' 2007, *Stratfor*, 13 March).

An April 2007 *BBC News* report states that Nepal is entering a new chapter in its history, but that it is still unclear what form the new system will take, and there is the potential for further disunity when the time approaches for the new elections:

The first question is, whether the election will be held in time or not. Only two-and-a-half months are left to prepare. And almost all deadlines agreed by the political parties so far have been missed.

There are also sceptics who believe the election may not happen at all due to the politically sensitive issues involved.

On top of such issues is the country's 240-year-old institution of monarchy.

The Maoists believe people will vote for a republican Nepal in the election.

The country's second largest party, the Nepal Communist Party (United Marxist Leninist), has already decided to fight the election on the republican platform.

Other smaller communist parties will follow the same path.

The Maoists' joining of the multi-party government in Nepal is a landmark event in the country's decades-long struggle for stable and sustainable democracy (Mishra, Rabindra 2007, 'Nepal's attention turns to the King', *BBC News*, 1 April

http://news.bbc.co.uk/2/hi/south_asia/6515533.stm – Accessed 5 April 2007).

The most recent report from the International Crisis Group – New Briefing: Nepal: Peace Postponed, 18 December 2007, indicates the following:

Despite a fresh commitment to hold constituent assembly elections within four months, Nepal's peace process still risks coming off the rails.

Error! Hyperlink reference not valid.* the latest briefing from the International Crisis Group, examines the faltering but still viable process. A year after a Comprehensive Peace Agreement promised a definitive end to its civil war, the country remains in political deadlock. Two election postponements reflect weak implementation of that deal, as well as the difficulty of addressing its shortcomings. Leaders have vowed to forge a new consensus and hold the elections by mid-April 2008 but have yet to address the problems that led to past delays or tackle crucial remaining issues such as security sector reform.

Suspensions among the parties – mainly between the Nepali Congress (NC), which dominates the government, and the Maoists – are echoed in ebbing public confidence. All parties must take steps to win back trust and earn legitimacy, and the international community needs to deliver a clear message on keeping the polls and the peace process on course.

“The current limbo is inherently unstable”, says Rhoderick Chalmers, Crisis Group’s South Asia Deputy Project Director in Kathmandu. “Nepal needs a coherent strategy to create an environment for elections, not just another quick-fix backroom deal”.

The peace process from the outset was based more on a convergence of interests than a common vision. It depended on parties reforming their political behaviour and left many crucial issues to be negotiated at an unspecified date. The consensus on power-sharing is now foundering and the prospect of elections has further weakened shared interests. The two armed forces have started to exert greater influence on the positions of the sides, Maoist parallel structures still hold sway in much of the country, and new ethnic and regional fronts have added to the situation’s complexity.

The government and the Maoists need to restore their unity through immediate confidence-building measures and demonstrate their commitment through their behaviour. Both should engage with non-governing parties represented in the legislature to build broader support for the steps ahead. Leaders should direct more focus to the constitutional process, developing mechanisms to increase public participation, make their parties more inclusive and win over potential spoilers.

The international community should agree on a common approach that presses for a realistic roadmap to elections, offers support and reminds all parties that recognition is conditional upon demonstrated commitment to peace and democracy.

“The one hopeful sign is parties’ growing recognition that implementing existing agreements and tackling remaining topics is the priority”, says Robert Templer, Crisis Group’s Asia Program Director. “If this is coupled with the will to hold elections by mid-April, it could produce a genuine popular endorsement and stabilise the country”.

In December 2007, the United Nations Office of the High Commissioner for Human Rights released a comprehensive new report on Nepal. The press release on the report summarises the main concerns in the report:

One year after the signing of the Comprehensive Peace Agreement (CPA), human rights have been marginalized and subordinated to political considerations, according to a report released today by OHCHR-Nepal. They must be restored to the core of the peace process. Failure to accord the necessary attention to human rights in the process risks engendering further violence and deepening social divisions.

The new report documents the main human rights concerns of the past year, noting that respect for human rights has diminished and that protection of the right to life has been

eroded, with more than 130 civilians killed between January and October 2007. Some 60 of those individuals were killed in criminal acts by armed groups, most of them since May, and a further 29 were killed as a result of police action, including some in circumstances amounting to excessive use of force.

In an environment where the State is failing in its obligation to provide security to the population and an environment upholding the rule of law, activities of armed groups have increased substantially, particularly in the Tarai. Increasing abductions, assaults and threats by cadres of the Communist Party of Nepal (Maoist), CPN-M, and the recent killing of journalist Birendra Sah have also had a serious impact on the human rights situation, undermining the CPN-M's commitment to human rights. The rights not to be arbitrarily detained and to physical integrity have also been violated at times by State authorities, including through torture and ill-treatment of criminal suspects.

Because of deeply engrained impunity, State agents, CPN-M cadres and others responsible for threats, abuse and violence, frequently act as if they are above the law. Increasing political interference in the work of the police, including pressure to release suspects implicated in violence and abuse, is also sending the wrong message. The report notes that ending impunity is a pressing priority and recommends ways that the Government of Nepal can demonstrate that there will be accountability for past and ongoing human rights violations and abuses.

OHCHR acknowledges that the authorities are facing complex challenges in the peace process and that some progress has been made. The appointments of the five commissioners to the National Human Rights Commission (NHRC) is an important step towards the NHRC developing into a credible, effective and independent institution; to that end, OHCHR is increasing its support to the NHRC. Steps have also been taken to address the participation of traditionally marginalized groups in the Constituent Assembly elections process. The 2006 Citizenship Act and the issuing of citizenship to more than two million individuals are also positive steps. The introduction of quotas for the Civil Service and police forces are also important measures which now require implementation. But OHCHR's report shows that a more comprehensive and inclusive approach is needed to address discrimination and participation. Lack of progress in improving women's representation and participation is particularly worrying.

Notwithstanding the postponement of the CA elections, the Government must take further concrete action to promote and protect the human rights of women and historically marginalized groups, including by ensuring their equal participation in the peace process and beyond. The realization of economic, social and cultural rights, such as access to education, health, food, water, land, shelter and other basic needs, intimately linked to discrimination in Nepal, is a key to sustainable peace.

OHCHR's report concludes with a set of recommendations (attached), to the Government, CPN-M, political parties, marginalized groups and others involved in protests, to the media and to armed groups. The report was submitted to the Government and the CPN-M for comments. Appended to the report are comments provided by the Government, which has challenged some of OHCHR's findings, as well as the Office's objectivity on certain issues. OHCHR will be responding to the Government's comments. It remains deeply concerned about the deteriorating human rights situation.

"Increasing respect for human rights should be a key dividend of the peace process, as called for by the people of Nepal in last year's Jana Andolan," said Richard Bennett, Representative of the UN High Commissioner for Human Rights in Nepal. "The current climate of diminishing respect for human rights is a warning to all parties that concerted efforts are needed now to reverse the downward trend. Commitments to human rights by the Government of Nepal and by the CPN-M are welcome and necessary but are not sufficient;

they must be translated into tangible actions and results” (United Nations Office of the High Commissioner for Human Rights 2007, *Restore human rights to the heart of the peace process*, says OHCHR, 12 December
<http://www.reliefweb.int/rw/RWB.NSF/db900SID/LSGZ-79UJ5E?OpenDocument&rc=3&cc=npl> – Accessed 14 December 2007 –
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Targeting of Indian army officers by Maoists

There have been reports that Maoists have harassed former soldiers, like the Gurkhas that have worked in the British and Indian army. According to the Nepal Research web site:

...Maoist guerrillas are equipped with state-of-the art weapons. Their guerrilla warfare techniques are extremely sophisticated. And, they claim a highly efficient intelligence network and communication links.

But the question here is -who provide these rigorous training to the Maoist guerrillas? We don't have any first-hand information about who trains the Maoist rebellions. Therefore, some believe that the Maoists were trained in some places of India. The People's War Group (PWG) of Northwest India has been accused by some for providing the training and other resources to the Maoists. The condition that Nepal has an open border with India may support this argument to some extent. But there has been no satisfactory evidence to prove that the Indians did this for the Nepalese Red Army. So, why not we look for other explanations?

While others believe that the retired Gurkha soldiers are behind the scene. Many of the Maoist affected areas are inhabited by a large number of well-trained, retired Indian and British Army Gurkha soldiers. There is an equally large number of retired Nepalese Army soldiers in the areas many of whom have received rigorous warfare training to work as the peace keeping force of the UN in different war prone regions of the world. So, it is not unlikely that these people either by force or by deliberate desires are providing training and combat human resource necessary for the guerrilla warfare... (Pokharel, S. 'Maoist war violence between hope and sorrow', Nepal Research web site http://nepalresearch.org/publications/maoist_war.pdf – Accessed 18 May 2004).

The following article describes an incident where Maoists abducted army officers and Nepalese military officials:

- 'British army officer, six Nepalese freed by Maoists' 2003, *ClariNews*, 21 October
http://quickstart.clari.net/qs_se/webnews/wed/bk/Qnepal-maoist-britain.RKWv_DOK.html – Accessed 18 May 2004 – Attachment 4

The following articles indicate that Gurkhas as well as those officers recruiting Gurkhas from Nepal are targeted by Maoists:

- 'Maoists shoot dead Nepali Gurkha working for Indian army' 2004, *Agence France Presse*, 8 January - Attachment 9
- Singh, K.M. 'Nepal Maoists say Americans safe, regret British officer's abduction' 2003, *Agence France Presse*, 27 October - Attachment 10
- Kay, J. 'Nepal Gang kidnap Brit army pair' 2003, *The Sun*, 21 October - Attachment 11

The UK Home office 2004 Nepal report also states:

...A BBC news report states that, due to Maoists threats to local youths, the British Welfare Centre – which acts as a recruiting depot – was reportedly unable to conduct any selections in 2002...(UK Home Office 2004, *Nepal Country Report*, April, section 6.41).

The Treaty of Peace and Friendship

On the issue of effective protection in India, the current information indicates the following.

Article 7 of the 1950 *Treaty of Peace and Friendship* between India and Nepal states as follows:

The Governments of India and Nepal agree to grant, on reciprocal basis, to the nationals of one country in the territories o [sic] the other the same privileges in the matter of residence, ownership of property, participation in trade and commerce, movement and other privileges of a similar nature.

In a 2006 advice to the Refugee Review Tribunal, DFAT advised that in practical terms, India has not prevented citizens of Nepal from entering India. India's Foreign Registration Regional Office (FRRO) had informed DFAT that: 'currently, Nepalese nationals were not denied entry into India unless they were on the look-out list of security agencies, suspected of involvement in terrorist activity or under instruction from the intelligence agencies'.

DFAT also provided information on the status and implementation of the 1950 Treaty sourced from 'Dr VD Sharma (Legal Division, Ministry of External Affairs' who advised 'that the provisions of the Treaty were implemented as a matter of course'; and 'that in the case of more general treaties, such as the 1950 Treaty of Peace and Friendship, the practice was for the conditions of the treaty to be met by India without the passage of the domestic legislation' (Department of Foreign Affairs and Trade 2006, DFAT Report 554, 23 October 2006).

Other information indicates that as the Treaty has not been incorporated into Indian domestic law, it cannot be enforced by the Indian courts:

Parliament has not enacted any laws that regulate the manner in which the executive shall sign or ratify international treaties and covenants. Nor does Parliament decide the manner in which these treaties should be implemented, except in cases where such implementation requires Parliament to enact a law' (Kapur, D. & Mehta, P.B. 2006, 'The Indian Parliament as an Institution of Accountability', UN Research Institute for Social Development website, January [http://www.unrisd.org/UNRISD/website/document.nsf/240da49ca467a53f80256b4f005ef245/8e6fc72d6b546696c1257123002fcceb/\\$FILE/KapMeht.pdf](http://www.unrisd.org/UNRISD/website/document.nsf/240da49ca467a53f80256b4f005ef245/8e6fc72d6b546696c1257123002fcceb/$FILE/KapMeht.pdf) – Accessed 11 May 2007).

A 2001 paper by the Indian government's National Commission to Review the Working of the Constitution provides information on 'The effect of Treaties on Indian Domestic Law'. The paper notes that different Indian courts have taken different views of the relevancy of the provisions of Indian treaties within Indian domestic law. For instance, the paper notes that 'a decision of the Kerala High Court, where it was held that until

domestic legislation is undertaken to give effect to the letter or spirit of an international covenant or declaration, the covenant or declaration cannot be held to have the force of law and cannot be enforced by the Courts in India' (National Commission to Review the Working of the Constitution 2001, 'Treaty-Making Power Under Our Constitution', Ministry of Law & Justice Government of India, 8 January <http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm> – Accessed 11 May 2007).

Several recent reports indicate that some members of India's Nepalese population have not, or at least feel that they have not, been reciprocated the rights of an India national. An update on vulnerable persons in India, published by the Norwegian Refugee Council on 3 May 2007, reports that: 'Nepalis living in north-eastern India are...a particularly vulnerable group in the North-East and have been targeted and displaced in Assam, Manipur and Meghalaya. It is unknown how many remain displaced today. Many have fled to Nepal'.

In recent years, reports from a number of sources, including news agencies and human rights groups, have claimed that some citizens of Nepal are subject to mistreatment in India by way of economic exploitation, police harassment and displacement. For example, a July 2005 Refugees International report which claims that only a fraction of India's Nepalis enjoy the rights accorded them under the 1950 treaty: '[w]hile the Nepalis in the formal sector in India enjoy the same legal rights as Indians by joining labor unions, the formal sector only includes 8% of the workforce, and the majority of Nepalis fall outside this sector'.

Those working in the informal sector are reportedly 'often denied their basic legal rights and are vulnerable to labour rights violations and various forms of exploitation'. A Kathmandu Post report of January 2004 states that: 'police [had] made 'identification certificate' compulsory for Nepalis in order to stay in hotels or to apply even for menial jobs in the city, said Pradeep Khatiwada, first secretary at the Royal Nepalese Embassy' (Shuyika, K. & Brown, M. 2005, 'India: Nepali migrants in need of protection', Refugees International website 25 July <http://www.refugeesinternational.org/content/article/detail/6429/?PHPSESSID=5ce00f92779c166324e1d> – Accessed 20 June 2006; Timsina, N.N & Bhattarai, D. 2004, 'Migrant Nepali workers are marked in Delhi', Kathmandu Post, 28 January <http://www.kantipuronline.com/php/kolnews.php?&nid=6786> – Accessed 8 March 2004).

One source also reports that some workers had been 'repatriated' (Roka, H. 2003, email to Sarai List 'Research Proposal', 20 January, Sarai website <http://mail.sarai.net/pipermail/reader-list/2003-June/005799.html> –accessed 21 March 2006).

A 2002 article reports that Nepalese 'leaving their villages need letters from the authorities to prove to Nepali and Indian police that they are not Maoists' (Thapa, K. 2002, 'The Exodus', Nepali Times, 13-19 December). Another article reports that Indian police forced around 40 Nepalese labourers to return to Nepal after failing to produce valid documents of personal identity:

According to the labourers, the Indian police do not consider Nepalese citizenship certificate as a valid document of personal identity and only consider the one that is provided by personnel at the Indian border, on the recommendation of concerned District Development Committee (DDC) or VDC authorities identifying the labourer and the area he comes from. ('Indian police send back 40 Nepali workers' 2002, The Kathmandu Post, 20 April).

Nepalese Maoists in India

A large number of media reports indicate that Maoists from Nepal are active in India, particularly in the border areas ('Alert on Maoist trouble in Bihar' 2003, *The Times of India*, 24 October – Attachment 59; 'Maoists' bases in N Bihar likely' 2003, *The Times of India*, 16 October – Attachment 60; 'Indian army taking action against communist rebels believed to be helping Nepal's Maoists, says defense minister' 2003, *Associated Press Newswires*, 12 September – Attachment 61; Jha, A. M. 2003, 'Maoists outwit officials to bomb rail lines', *The Times of India*, 17 July – Attachment 62; Jha, S. K. 2002, 'South Asia: India, Nepal and the Maoist maze', *Asia Times* online edition, 23 October http://www.atimes.com/atimes/South_Asia/DJ23Df01.html - Accessed 27 May 2004).

The South Asia Terrorism Portal provides comprehensive coverage on the linkages that Nepalese Maoists have with Indian left-wing organisations.

According to available information, the Maoists of Nepal have well-established linkages with Indian left-wing extremist organizations, primarily with the People's War Group (PWG) and Maoist Communist Centre (MCC). The first signs of contacts were reportedly registered during 1989-1990, when the two groups started collaborating in order to expand their influence. Towards this end, they began the process of laying a corridor, which is now widely referred to as the Revolutionary Corridor (RC) extending from Nepal to across six Indian States, including Bihar, Chhattisgarh, Jharkhand, Andhra Pradesh, Orissa and Madhya Pradesh. This entire area has been identified in Maoist literature as the Compact Revolutionary Zone (CRZ). The CRZ was organized by the Nepal and Indian members of the Naxalite (the popular term for left-wing extremism in India- the movement originated in Naxalbari [hence the term Naxal] in the State of West Bengal in the late 1960s) Movement, in a meeting at Siliguri in the Indian State of West Bengal during August 2001.

Gradually, the interaction between Maoist insurgents and the PWG increased with the sharing of knowledge about guerilla warfare, bomb manufacturing techniques and arms training. Nepalese Maoists had sent their delegates to the March 2001 Congress of PWG held at Abuz Marh in the Bastar region of Chhattisgarh. The establishment of CRZ gave a wider space and platform for all the proscribed Nepal and Indian left-wing extremist organizations to strengthen their bases in both the countries.

The more radical forces in South Asia, including both the PWG and Nepalese Maoists, are members of the Revolutionary Internationalist Movement (RIM). In July 2001, about 10 extreme Left Wing (Maoist) groups in South Asia formed the Coordination Committee of Maoist Parties and Organization of South Asia (CCOMPOSA), in which the Nepalese Maoists, PWG, MCC, Purbo Banglar Movement (Bangladesh), Communist Party of Ceylon (Sri Lanka) and other Indian left-wing extremist parties became members. The appearance of graffiti in remote villages in Naxalite-strongholds, in Rayakal and Mallapur mandals (administrative unit) of Karimnagar district in Andhra Pradesh, hailing CCOMPOSA points the spread of the idea of a common front of left-wing extremist groups in South Asia. Moreover, the Central Committee of the Maoists, in late-January 2002, passed a resolution stating that it would work together with the PWG and the MCC in fighting the ban imposed on the latter two organisations in India, under the Prevention of Terrorism Act, 2002. A year earlier, in 2001, the Maoists had sent a senior leader named Gaurav as a fraternal delegate to attend the 9th Congress of the PWG. Reports indicate that the Maoists and the PWG have also formed the Indo-Nepal Border Region Committee to coordinate their activities in North Bihar and along the India-Nepal border.

For quite some time, the Maoists have also been working closely with the MCC for unification, consolidation and expansion of Maoist movement in India and across South Asia. A careful examination of expansion of Naxalite activity in Bihar in the last two years would reveal that the growing linkages between the MCC and the Nepali Maoists are part of their

larger strategy to create a 'Compact Revolutionary Zone' stretching across Andhra Pradesh, Chhattisgarh, Jharkhand, and Bihar to Nepal. The porous Bihar-Nepal border, the general breakdown of rule of law, poor governance and incapacity of the police force provides a context for these left extremist groups to operate with ease.

In February 1996, the MCC Central Committee had reportedly published a paper welcoming the Maoist movement in Nepal. Reports of April 2000 indicated that the MCC and Maoists were holding joint training camps in Hazaribagh and Aurangabad. In September 2000, MCC leader Pramod Mishra is alleged to have visited Nepal for extensive discussions with Maoist leaders. In December 2001, the MCC and the PWG, in their joint meetings, held in the Jharkhand forests, resolved to support the Maoist insurgents in Nepal. In the same year, the MCC, PWG and Maoists formed an "Indo Nepal Border Regional Committee" to coordinate their activities in the border areas.

The porous Bihar-Nepal border is easily permeable. Bihar has eight districts and 54 police stations situated on the border. In the recent past, the Bihar police have arrested a number of Nepalese Maoists in the border districts of West and East Champaran, Sitamarhi, Sheohar and Madhubani. Taking advantage of a general breakdown of law and order, the Nepalese Maoists have reportedly set up bases at several places along the border. Reports indicate the existence of training camps in the forests of Bagha in the West Champaran district, which has emerged as a safe haven for the Nepalese insurgents. The Bihar police also suspect that some top leaders of the Nepalese Maoists, including Baburam Bhattarai, were/are hiding in Bihar.

Not much is known about the Maoist links with other militant or left-wing extremist groups operating in India, besides that they are linked to a few Naxalite groups through CCOMPOSA. Besides, a left-wing extremist group, the Communist Party of India—Marxist-Leninist (CPI-ML) Janashakthi, which has a marginal presence at least in six Indian States, but is very active in isolated and limited number of pockets in Andhra Pradesh, expressed support to the Maoists. It is a co-signatory, along with 41 other left-wing extremist groups ranging from South America to South East Asia, to resolution that 'condemned and opposed the malpractice of the fascist state of Nepal' and demanded 'life security' for imprisoned Maoist cadres, leaders and sympathisers.

The Maoists, with the help of Pakistani Inter Services Intelligence (ISI), have been attempting to establish links with Naxalite groups such as the PWG and the MCC by using the Siliguri corridor in West Bengal. Media reports of December 29, 2002, indicated that three members of a Maoist-affiliate, All Nepal National Free Students' Union-Revolutionary, were arrested at the Siliguri bus station, while on their way to Bihar to attend a meeting convened by the PWG.

The growing influence of Nepalese Maoists in other parts of India was unearthed after four of its cadres were arrested in West Bengal on February 26, 2003. The arrested Maoists confessed during interrogation of their plan to use West Bengal as a corridor between their areas of domination in India and Nepal. Darjeeling and Siliguri are the important transit routes. Also they are in a process of consolidating their presence in West Midnapore district, Bankura and Purulia especially in North Bengal with the help of Kamatapur Liberation Organisation (KLO).

The substantial population of nearly eight million Nepali residents in India (primarily in Sikkim, Darjeeling, Siliguri, Shillong, Dehradun, Himachal Pradesh and Gorakhpur-Lucknow belts) have established a countrywide organization called the Akhil Bharatiya Nepal Ekta Samaj (ABNES). It was banned under the Prevention of Terrorism Act (POTA) in July 2002 by the Government of India. ABNES was registered with the stated objective of securing unity among immigrant Nepalese residing in India and working for their welfare. However, it gradually became involved in subversive activities and began to function as a front for the Maoist insurgents of Nepal. It is also believed that the organization is working for the idea of a *greater Nepal*.

There is also some reportage about the Nepalese Maoists' links with insurgent groups active in India's North-east like United Liberation Front of Asom (ULFA), Kamtapur Liberation Organisation (KLO), Gurkha National Liberation Front (GNLF) and Gurkha Liberation Organisation (GLO).

Media reports also indicate that Maoists "have the support of a section of the substantial Nepalese population living in India" (Jha, S. K. 2002, 'South Asia: India, Nepal and the Maoist maze', *Asia Times* online edition, 23 October http://www.atimes.com/atimes/South_Asia/DJ23Df01.html - Accessed 27 May 2004).

Other reports state that Nepalese Maoists enjoy "unrestricted movement...in India" ('Confused and convoluted' 2002, *Spotlight* online edition, 21-28 June, Volume 21, Number 49). <http://www.nepalnews.com.np/contents/englishweekly/spotlight/2002/jun/jun21/national5.htm> - Accessed 27 May 2004).

There are also indications that Nepalese Maoists "have been trying to consolidate their position among people of Nepali origin and Nepali diasporas in Nepalese dominated areas" of India As indicated in Attachment, "Baburam Bhattarai, chief of the United People's Front, the 'political wing' of the Maoists, claimed that they were trying to 'organise' the approximately 10 millions Nepalese in India" (Jha, S. K. 2004, 'Maoists linkages with Northeast Insurgents: growing concerns', Institute of Peace and Conflict Studies website, <http://www.ipcs.org/ipcs/countryIndex2.jsp?action=showView&kValue=836&country=1015&status=article&mod=b> – Accessed 27 May 2004; Bhat, A. 2004, 'ULFA's reign of terror at vanishing point', The Day After website <http://www.dayafterindia.com/mar104/states.html> - Accessed 27 May 2004).

Further reports indicate that the number of Nepalese Maoists in India has increased rapidly "since the state of emergency was declared in Nepal" in 2002 ('Nepalis in India' 2002, *Nepali Times* online edition, 23-29 August <http://www.nepalitimes.com/issue108/fromthenepalipress.htm> - Accessed 27 May 2004).

FINDINGS AND REASONS

On the basis of the applicant's Nepalese passport, the Tribunal accepts that the applicant is a national of Nepal. Although the applicant resided in India for several years, there is no evidence that he acquired or has the ability to acquire Indian nationality as a result of his employment with the Indian army. Accordingly, the Tribunal accepts that the applicant's only nationality is Nepalese and has assessed his claims against Nepal as his country of nationality.

The applicant claims that he was in the Indian army for many years prior to his retirement. The applicant claims that although he resided primarily in India he still attracted the attention of Maoists in Nepal who had infiltrated his family's village area. The applicant claims that he and his family were regularly harassed and household goods and other items were repeatedly stolen from the family home by Maoists. The applicant and his family were also forced to provide large 'donations' of money to the Maoists. The applicant further claims that the Maoists repeatedly attempted to recruit him and subjected him to extreme brutality on one occasion for his refusal to join their forces. The applicant also claims that his house was "locked" by the Maoists and subsequently looted and the contents of the house destroyed. The applicant claims that the Maoists have continued to harass his family since his departure

and he fears that if he returns to Nepal he will be targeted by Maoists who will seek to obtain further donations and will attempt to recruit the applicant and retaliate against him for his refusal to join them. The applicant claims that as a former Indian army officer he will be sought by Maoists not only as a result of his military expertise, but also because he is considered, by virtue of his former employment, to hold a political opinion opposed to the Maoists. The applicant also fears harm from Maoists in India if he were attempt to obtain effective protection in India.

The Tribunal found the applicant to be a highly credible witness who provided detailed and consistent evidence at the Tribunal hearing and evidence that was entirely consistent with his detailed written statement provided to the Department. The Tribunal accepts, on the basis of original documentation and the applicant's detailed oral evidence regarding the Indian army and his period of employment with the Indian army, that the applicant was a member of the Gorka (Gurkha) regiment in India for many years before he retired. The Tribunal accepts that the applicant, as an officer of the Indian army was sought by the Maoists as a result of his obvious considerable skills and experience in the military. The Tribunal considers it entirely plausible and consistent with the independent evidence above, which indicates that large numbers of retired Indian army officers reside in Maoist dominated areas in Nepal and there is harassment and targeting of former soldiers, that the applicant would have been sought by Maoists in his village. Although the independent evidence above indicates that there are suspicions that large numbers of retired army officers have provided training to Maoist groups, the Tribunal accepts that the applicant refused to become involved in their activities because he views the Maoists as "terrorists" and is strongly opposed to their activities in Nepal and India. The Tribunal considers the applicant's evidence is consistent with the independent evidence, regarding the violent methods employed by Maoists, that his refusal to join their forces resulted in him being seriously harmed. Accordingly, the Tribunal accepts that the applicant was sought by the Maoists in Nepal and he refused to join their forces and that his family home was looted and all but destroyed by Maoists, and his family forced to live elsewhere as a result of the home being locked by Maoists. The Tribunal also accepts that the family was subjected to several demands for money and forced to pay large sums of money to the Maoists to avoid harm. The Tribunal accepts that as a result of the above incidents the applicant was forced to avoid harm by staying with his family for short periods of time and moving from his village area to other areas, and eventually to Kathmandu.

The Tribunal further considers that the applicant, a retired Indian army officer who has been targeted by the Maoists in the past, would continue to be harassed and targeted if he returned to his village area. The Tribunal accepts that although the applicant's family have continued to live safely in this area, albeit with demands for money, goods being stolen and demands for information on the applicant's whereabouts, the main target of the Maoists attention is the applicant as a result of his employment and experience with the Indian army. The Tribunal accepts the applicant's claim that although there has been a ceasefire in Nepal, in reality there have been limited changes to the political situation in Nepal. The independent evidence and the evidence provided by the applicant confirms that despite the signing of the ceasefire and pleas from the United Nations, Maoist rebels have continued to commit human rights violations, including killings, abductions, torture and executions and oppositional parties have continued to receive threats and intimidation from Maoists. The Tribunal accepts that it would be unsafe for the applicant to return to his village area at least in the reasonably foreseeable future.

Given the Tribunal's findings above, the Tribunal must consider whether the applicant can relocate elsewhere in Nepal, or whether he can access effective protection in India.

The applicant provided evidence that he lived safely in Kathmandu for a period of time. The applicant has claimed that whilst living in Kathmandu he continued to be highly fearful for his safety and avoided harm by living discretely. The applicant did not work in Kathmandu and lived with relatives, but on occasion went to live with other persons so as not to remain in the same place for an extended period. The Tribunal accepts that the applicant, as a retired army officer, would inevitably attract the attention of Maoist elements in Kathmandu. The independent evidence above indicates that Maoists attacks have occurred in several parts of the country and that the violence by Maoists in several parts of Nepal, including in Kathmandu, has continued unabated. Whilst the Tribunal considers it less likely that the applicant will be harmed in Kathmandu or in other parts of Nepal than in his own village, the Tribunal considers that there is at least a real chance that it will become known in Kathmandu or other parts of Nepal that he has previously been sought to join the Maoists and that he refused to do so. The Tribunal is mindful that the situation may improve in the coming months when elections have been held. However, the independent evidence above indicates that the elections have been delayed several times and although they have now been set for April 2008, there is the possibility of further delays and continuing instability and uncertainty in Nepal. The Tribunal is not satisfied that the applicant can currently, or in the reasonably foreseeable future, reside safely in Kathmandu without fear of being targeted by Maoist elements who will seek to retaliate against him for his past refusal to join them, his continual refusal to join them or to pay money to them.

The Tribunal accepts the applicant's claim that the authorities will not be able to protect him from the harm he faces and finds that the applicant cannot access state protection, given that the Maoists are now effectively part of the government of Nepal. Given this finding and the Tribunal's findings that the applicant cannot reside safely in any part of Nepal, the Tribunal finds that the applicant is at risk of serious harm in Nepal because he has been an officer of the Indian army who has refused to join the Maoists in the past and would continue to do so in the future. Accordingly, the Tribunal finds that the applicant has a well-founded fear of persecution in Nepal for reasons of his actual or imputed political opinion as a person opposed to the Maoists, or because of his membership of a particular social group of persons who were in the military. Accordingly, the Tribunal is satisfied that the applicant has a well founded fear of persecution for a Convention reason in Nepal.

The Tribunal has also considered whether the applicant can avoid persecution in Nepal by living in India under the terms of the *Treaty of Peace and Friendship* between India and Nepal. In accordance with s.36(3) of the Act (see p.2 above), the Tribunal does not have protection obligations to the applicant if he has not taken all possible steps to avail himself of a right to enter or reside in India. The Tribunal is satisfied that the applicant has a right to enter and reside in India and there is no evidence that he has taken any steps to avail himself of the right. The Tribunal further considers that the applicant, as a retired army officer who has served the Indian government for a substantial period of time, would have greater rights to enter and reside in India than ordinary Nepalese persons and considers it extremely unlikely that the applicant would be forced to return to Nepal. Nevertheless, the issue for the Tribunal is not whether the applicant can, as a matter of "practical reality and fact enter and reside in India" (see *NAGV & NAGW of 2002 v MIMIA* (2005) 222 CLR 161 which effectively overruled the principle that it was sufficient that "as a matter of practical reality and fact" an applicant was likely to be given effective protection), but whether the applicant

has a “legally enforceable” right to enter and reside in India (see *Applicant C v MIMA* [2001] FCA 229 (Carr J, 12 March 2001, *Kola & Anor v MIMA* [2001] FCA 630 (Mansfield J, 30 May 2001); and *Kola v MIMA* (2002) 120 FCR 170). The independent evidence indicates that although there is a treaty, there has been no implementation of the treaty into domestic law. As such, the treaty does not have the force of law and cannot be enforced by the courts of India. The Tribunal therefore considers that there remains considerable uncertainty regarding the enforceability of this treaty in terms of their rights to enter and reside in India by individual Nepalese persons residing in India, and in such circumstances, there is also uncertainty as to whether the applicant’s right to enter and reside in India is a legally enforceable right.

Notwithstanding the above, the Tribunal considers it unnecessary to make definitive findings on the issue of whether the Treaty of Peace and Friendship equates to a legally enforceable right for Nepalese persons to enter and reside in India. This is because the right expressed in s.36(3) is subject to s.36(4) which provides that if an applicant has a well founded fear of being persecuted in India for reasons of his race, religion, nationality or membership of his particular social group, s.36(3) does not apply. The Tribunal must, therefore consider, whether the applicant has a well founded fear of being persecuted in India.

The applicant has claimed that he would be unsafe in India because of the prevalence of Maoists in parts of India. The Tribunal considers that the independent evidence indicates that there are Nepalese Maoists operating in Nepal and that they have well-established linkages with Indian left-wing extremist organizations, primarily the People’s War Group (PWG) and Maoist Communist Centre (MCC). There is also evidence indicating that the number of Maoists in India has substantially increased since the State of Emergency was declared in Nepal in 2002. While there is no evidence indicating that Nepalese Maoists or Indian Maoist groups target Nepalese persons in India, the Tribunal considers that the applicant would have a sufficient profile as a retired Indian army officer that he would inevitably attract the attention of Maoists in India or Maoists from Nepal who have become aware of the applicant’s presence in India. The Tribunal considers that given the presence of large numbers of Nepalese persons in India, whom according to the independent evidence have frequently sided with Maoist groups, the applicant would attract the attention of Nepalese persons if he did not live discreetly. Whilst there may be parts of India which the applicant could undoubtedly relocate to if he were to live discreetly, the Tribunal considers it inconsistent with the principles of effective protection that the applicant should be required to live discreetly in a third country which is not his country of nationality. The Tribunal also accepts that the applicant would not be able to access adequate state protection in India given the prevalence of Maoist groups and the violent and persistent methods employed by Maoists in India. Accordingly, the Tribunal is satisfied that s.36(3) does not apply to the applicant because he has a well founded fear of persecution in India.

CONCLUSIONS

The Tribunal is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Therefore the applicant satisfies the criterion set out in s.36(2) for a protection visa.

DECISION

The Tribunal remits the matter for reconsideration with the direction that the applicant satisfies s.36(2)(a) of the Migration Act, being a person to whom Australia has protection obligations under the Refugees Convention.

I certify that this decision contains no information which might identify the applicant or any relative or dependant of the applicant or that is the subject of a direction pursuant to section 440 of the Migration Act 1958.

Sealing Officer's I.D. PRRRNP